FOR ARGUMENT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-5010

ALPHONSE BIFULCO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONER

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In this brief, reply is made to seven matters advanced in the Brief for the United States. Points 1 through 4 pertain to arguments in Section A of the Government's brief (Res. Br. at 8-16); Points 5 through 7 pertain to arguments in Section B of the Government's brief (Res. Br. at 17-31). Page references to the Government's brief with respect to the arguments in issue are provided within each point.

1.

The Government seeks to establish that, under the statutory scheme, the inclusion of a special parole term

follows from the seriousness of the particular substantive offense. The Government thus avers: "Of the nine separate offenses, the four most serious mandate imposition of a special parole term whenever imprisonment is imposed." Res. Br. at 12. However, the correlation between provision of a special parole term and the seriousness of an offense does not exist because the specified offenses are not the subchapter's four most serious offenses.

First, the Government removes from consideration 21 U.S.C. §848, defining the crime of continuing criminal enterprise, the most serious of all the drug offenses, though this section is within the same statutory grouping as the sections examined by the Government (21 U.S.C., chap. 13, Subchap. I, Part D; see Pet. Br. at 16-19 (chart) and at 16 note 17). The Government's distinction (Res. Br. at 12 note 7) that §848 imposes "a wholly different, and more severe, sentencing scheme" is a reason for including §848 within — and not eliminating it from — an analysis of the nature and severity of the sentences authorized in the drug abuse sections.

Further, even if §848 is not considered in defining the most serious drug offenses and examination is restricted to §§841-844 as the Government wishes, the conclusion that the four specified offenses are the most serious remains inaccurate. 21 U.S.C. §841(d) carries imprisonment and fine punishments as severe as two of the Government's four "most serious offenses," and 21 U.S.C. §843 carries imprisonment and fine punishments more severe than one of the four offenses specified by the Government. Section 841(d) and §843, neither of which the Government addresses, do not include special parole provisions.

Thus, the Government's contention that "the four most serious [offenses] mandate imposition of a special parole

term whenever imprisonment is imposed" is incorrect. The most that may be said in favor of the Government's position is that four of the seven most serious offenses mandate the imposition of a special parole term whenever imprisonment is imposed.* The absence of correlation precludes support for the argument that seriousness of the offense in and of itself is grounds for inclusion of special parole in conjunction with imprisonment.

2.

The Government formulates four "basic approaches" to attempts and conspiracies which could have been adopted by Congress, and then seeks to establish, by eliminating options "1", "2", and "4", that option "3" — "a separate attempt and conspiracy section that incorporate[s] by reference the sentencing provisions set out in the substantive offense sections" (Res. Br. at 14) — is the approach which was adopted by Congress.

The Government's four approaches do not exhaust the possibilities; there is a fifth approach which the Government has ignored: a separate attempt and conspiracy section that defines the type of punishment authorized but obtains the limits for such punishment by reference to a related substantive offense section. This scheme is quite different from that of the Government's option "2" — "a separate attempt and conspiracy section that include[s] its own sentencing provisions" — which the Government mistakenly attributes to our brief. Res. Br. at 14. We fully

*Thus, it may also be said that three of the six most serious offenses do not mandate imposition of special parole, or that seven of the twelve offenses which carry possible sentences of imprisonment do not provide for special parole.

agree with the Government that option "2" does not accurately describe §846, because option "2" entails a total self-sufficiency not present in §846. The same defect is not in evidence in the described fifth approach, which is the approach we actually have advanced. See Pet. Br. at 13-14. As we show in our main brief, this provides the most accurate description of the approach taken by Congress in §846.

3.

Congress' addition of the special parole clause to H.R. 18583, §405 (corresponding to 21 U.S.C. §845) is among the most cogent points favoring our position that, by not amending §846, Congress intended to prescribe only imprisonment and fine as sentencing alternatives. The Government responds that a separate special parole clause in §845 was necessitated by a concern not applicable to §846: "to make clear that regardless of whether incarceration is actually incremented as authorized, incrementation of special parole is mandatory." Res. Br. at 15.* Contrary to the Government's claim, §845's separate special parole clause was not necessary for this purpose, for a general doubling would have effected the same result.

The length of a special parole term is set in accordance with a stated minimum term which is mandatory. The doubling of that term would mandate that twice the stated

*The Government's contention, and our comments in reply, are equally applicable to the second offender provisions (see Pet. Br. at 32) which, like §845, were amended after the introduction of special parole in the substantive offense sections specifically to include special parole.

term be imposed. This is in distinction to imprisonment terms, which are specified as permissible maximums without mandatory minimums which, when doubled, are still free of mandatory minimums. Thus, mandatory incrementation of special parole in conjunction with permissible incrementation of imprisonment is implicit in the definition of special parole and imprisonment, and a separate special parole clause in §845 was not needed to communicate this requirement. If, as the Government claims, an imprisonment provision referenced to another section — as is found in both §845 and §846 — incorporates special parole as well, there was no point in Congress' amending §845 (in H.R. 18583, §405) by adding a separate special parole clause.

This establishes that Congress added the special parole clause to §845 — as it did to the various second offender provisions in those sections containing such requirements — because it wished to make special parole, in addition to the already specified imprisonment and fine, a part of a §845 sentence. It is thus apparent that Congress viewed §845 without a special parole clause as not providing for special parole, and that by failing to add a special parole clause to §846, Congress would be allowing that section to function precisely as it had prior to the introduction of special parole: as referenced exclusively to the imprisonment and fine provisions of an associated substantive section.

4.

The Government seeks to find authorization for special parole in §846 in the term "imprisonment," and advances the following argument: "Special parole may never be imposed without imprisonment; conversely, imprisonment cannot be imposed without special parole." Res. Br. at 16.

Such converse reasoning does not work here because special parole and imprisonment have not, in the drug abuse sections, been made conditional on each other. Whereas special parole is conditional upon imprisonment, our chart (Pet. Br. at 16-19) reflects that imprisonment is quite independent of special parole, and is often imposed alone. Thus, a major premise of the Government's "imprisonment" argument — that "imprisonment cannot be imposed without special parole" — is false, and the argument must fail.

5.

The Government, in its analysis of the statutory history, seeks to show that Congress intended to retain a "congruence" between the penalty for conspiracy and that for the object offense. The Government argues that the original drug bills of the Ninety-first Congress sought to perpetuate the congruence found in the former law. Res. Br. at 17-21. The Government then argues that in the later bills which included the special parole amendments, Congress intended to retain the congruence found in the earlier bills. Res. Br. at 21-27.

(a) The Ninety-first Congress, in its early bills to amend the drug laws, designed a penalty structure which departed dramatically from the former law. As the Government acknowledges, "[t]he express objectives of the [early] bills included consolidation of existing drug legislation into a rational, coherent scheme, elimination of inconsistencies and inadequacies in the existing law, and formulation of a more realistic sentencing structure." Res. Br. at 19-20. Among the changes were the removal of conspiracy from the substantive offense sections where it had been in the various sections of the former law (see 21 U.S.C. (1964 ed.) former

§§174, 176a, 176b; 26 U.S.C. (1964 ed.) former §§7237(a), 7237(b)), and the establishment of a separate section with its own sentencing authority for conspiracy and attempt.

By creating this new section, Congress eliminated the necessity of congruence which had existed under the former law's single-section approach; moreover, as noted in our main brief (Pet. Br. at 13), Congress cast this new section in language ("which may not exceed") which, though allowing for equal punishments, does not demonstrate an intention that there must exist a congruence between the punishments for conspiracy and substantive offenses. Prior to the introduction of the special parole concept, the legislators chose to establish a penalty structure in which the type of punishment for conspiracy would be identical to that of a related substantive act. But as is evident from the considerable change vis a vis the former law, this was a fresh determination, not one compelled by an outmoded structure, and changes in this initial formulation as the various bills underwent examination and amendment were a natural evolution conforming to Congress' intent to reevaluate. Proof that the bill ultimately enacted was intended to establish congruence, therefore, must rest not on the express congruence of the former law nor on the congruence of the early bills but on evidence that, after the special parole amendments, Congress intended that the punishments provided under §846 and the amended substantive offense sections be congruent.

(b) The Government's sole proof on this last point is a statement of Bureau of Narcotics and Dangerous Drugs Director John Ingersoll to the House Committee on Ways and Means during the Committee's hearings on H.R. 13742 and 17463: "Upon conviction [for conspiracy], his sentence

may not exceed the punishment prescribed for the offense which was the object of the . . . conspiracy." Res. Br. at 24.

Mr. Ingersoll's statement reflects the phraseology found in the second clause of H.R. 17463, §504, and now identically in 21 U.S.C. §846: "which may not exceed the maximum punishment prescribed for the [object] offense." This suggests that Mr. Ingersoll merely deleted the first clause of the very section from which he was reading, in which the antecedent qualifiers — "imprisonment or fine or both" — appear. See Pet. Br. at 12. That Mr. Ingersoll's omission was unintentional is evident from the fact that, in the prepared Justice Department statement to which the oral testimony pertained, a chart (see Pet. Addendum III) showed that conspiracy was not subject to special parole (see Pet. Br. at 28 and Pet. Addendum at III-3) and stated that "H.R. 17463 provides that any person who endeavors or conspires to commit any offense under the act may be punished by imprisonment and/or fine, which may not exceed the maximum punishment prescribed for committing the offense" (see Pet. Addendum at III-3 note 6). Similarly, in his testimony before the House Subcommittee on Public Health and Welfare of the Committee on Interstate and Foreign Commerce several months earlier (see Pet. Br. at 27-28), Mr. Ingersoll described the punishment applicable to conspiracy in the three Justice Department sentencing alternatives (all providing for special parole in several substantive sections) as being "imprisonment and/or fine." In the absence of an express repudiation by Mr. Ingersoll in his testimony before the Committee on Ways and Means of the statutory language of the bill or of the entries on the chart, and indeed, in the absence of a specific statement by Mr. Ingersoll that H.R. 17463, §504 was to include the new special parole provision of which he had just been speaking,

the Government's attribution to him of the view that special parole applied to conspiracy (see Res. Br. at 24-25) is speculative.

Moreover, even were it assumed that Mr. Ingersoll shared that view at the time of his testimony, this would not prove determinative on the question of Congress' intent. As just noted, members of Congress were advised by Mr. Ingersoll more than once that the applicable punishment for conspiracy was imprisonment and/or fine; and other information, such as Senator Dodd's chart accompanying S. 3246 (see Pet. Br. at 26-27; Pet. Addendum II) and H.R. Rep. No. 91-1444 accompanying H.R. 18583 (see Pet. Br. at 29 and notes 45 and 46), provided Congress with a sound basis for believing that the conspiracy sections of the bills preceding the Comprehensive Act, all worded identically to 21 U.S.C. §846, provided for punishment consisting exclusively of imprisonment and/or fine. Had it been Congress' intent to include an additional punishment of special parole for conspiracy, it was clearly on notice that the statutory language of the conspiracy sections had to be amended. Instead, Congress declined every opportunity to amend these sections — S. 3246, §504; H.R. 17463, §504; H.R. 18583, §406 — after the introduction of special parole; while other sections were changed by adding specific special parole clauses, the punishment for conspiracy remained "imprisonment or fine or both."

Thus, there is no proof that Congress either believed or desired that congruence would be a feature of the new sentencing structure.

6.

The Government asks this Court to employ "logic, reason and experience" to ascertain what Congress, were it attentive to its duty, would have intended. The Government states:

> In view of these goals [related to sentencing], it is simply inconceivable that Congress intended to withhold special parole as a means of penalizing those convicted of drug conspiracies. Petitioner has pointed to no reason why Congress would consider special parole a needed and appropriate response to substantive drug offenses . . yet would discard the same remedy for those who join together conspiratorially to accomplish the same end. . . . [S]pecial parole is plainly every bit as appropriate in dealing with persons convicted of conspiracy as with substantive violators. In short, it defies logic, reason and experience to conclude, absent at least some evidence, that Congress intended the result urged by petitioner. [Footnotes omitted. Res. Br. at 30-31.]

The heralds of this argument appear in earlier portions of the Government's brief: Congress' failure to add a special parole clause to §846 was "inadvertent" (Res. Br. at 7); the absence of a special parole clause is rooted in Congress' failure to utilize "more explicit draftsmanship" (Res. Br. at 17); and Congress, after adopting special parole clauses in various sections, merely "neglected to effect a conforming change in the conspiracy section" (Res. Br. at 22).

The questions of why Congress elected the sentencing structure reflected in the statute and whether the absence of special parole from a §846 sentence results in a better or a worse structure reach beyond the task of interpreting the statute as written. To accept the Government's invitation to find Congress' intent by hypothesizing what is "inconceivable" or "inadvertent" would invite requests to analyze other statutes not as to what Congress did but as to what it might have done. It is, for example, no less a question of "logic, reason and experience" why special parole should be applicable to some substantive drug offenses but not to others (including the most serious drug trafficking offense, §848) or why, in other parts of the United States Code, sentence parity exists with respect to some conspiracy and related substantive sections but not with respect to others. This Court, in its wisdom, might well be able to redraft legislation so that consistency is better served. In doing so, however, it might well distort what Congress actually intended. To hold petitioner to proof of a "reason why" Congress did what it did before giving effect to the statute as written would involve the Court in the kind of judicial legislating Justices Brandeis and Frankfurter counseled against. See Pet. Br. at 37.

7.

The Government confronts our lenity argument in a footnote. Res. Br. at 31 note 26. Nonetheless, the significance of this doctrine to the case *sub judice* is confirmed by several of the Government's own arguments. As just noted, the Government has described Congress' failure to place a special parole clause in §846 as an oversight which does not truly reflect Congress' intent. If, notwithstanding the evidence that Congress acted intentionally, this Court is convinced that the absence of a special parole clause in §846 may have been inadvertent, there can be only speculation as to Congress' intent. Inadvertence is not an act which discloses an underlying intent with any degree of

certainty, but a non-act which leaves intent uncertain. As the Government acknowledges (Res. Br. at 31 note 26), the rule of lenity applies when "uncertainty exists as to Congress's intent."

CONCLUSION

For the foregoing reasons and the reasons set forth in the main brief for petitioner, the judgment of the court of appeals should be reversed and the case remanded with instructions to vacate petitioner's special parole term as unlawfully imposed under §846.

Respectfully submitted,

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